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Supreme Court, U.S.

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No. 88-251

ORIGINAL

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOHN CARROLL

Petitioner,

CONSOLIDATED RAIL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

STATE OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Was summary judgment properly granted on the issue of negligent infliction of emotional distress since there was no accident, injury or near miss to Petitioner or anyone else?

PARTIES TO THE PROCEEDING

Petitioner, Thomas J. Carroll, was the plaintiff in the District Court and the appellant in the Court of Appeals. Respondent, Consolidated Rail Corporation, was the defendant in the District Court and the appellee in the Court of Appeals.

Respondent has no parent corporation(s). It has the following affiliates and non-wholly-owned subsidiaries:

- The Akron and Barberton Belt Railroad Company
- Albany Port Railroad Company
- The Belt Railway Company of Chicago
- Calumet Western Railway Company
- Chicago and Western Indiana Railroad Company
- Indiana Harbor Belt Railroad Company
- The Lakefront Dock and Railroad Terminal Company
- Nicholas, Fayette and Greenbrier Railroad Company
- Peoria and Pekin Union Railway Company
- Pittsburgh, Chartiers and Youghiogeny Railway Company
- Railroad Association Insurance, Limited
- Trailer Train Company
- Transportation Data Exchange, Incorporated

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No. 91-6253

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

THOMAS J. CARROLL,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Consolidated Rail Corporation, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the judgment order of the United States Court of Appeals for the Third Circuit entered on August 9, 1991.

STATEMENT OF THE CASE

For almost 19 years, Thomas J. Carroll ("Carroll") worked as a train dispatcher. In 1986, he was promoted to Assistant Chief Train Dispatcher at Delaware Avenue and held that position until January 9, 1989. As Assistant Chief Train Dispatcher, Carroll was responsible for monitoring trains and their freight, maintaining records of inventories, and issuing directions over the radio to railroad yards and train crews.

On January 9, 1989 Carroll reported to his usual assignment. While taking his turn-over instructions from John MacPherson ("MacPherson"), Carroll suddenly realized that they were sitting on the left side of the room. MacPherson explained to him that they were using the left side of the room because the telephones on the right were not working. Behind Carroll, someone was screaming on the phone about a misdirected car and two other dispatchers were arguing about a train consist.

Carroll could not cope with the pandemonium in the office so he got up and walked in and out of the room several times. Upon returning to the room, he found phones ringing and radios blaring. It was then that he decided to call the daylight assistant chief dispatcher and ask him to come in and take his place. Carroll told his supervisor that he was sick and went home. Since that day, he has not returned to work.

Carroll asserts, as the basis for his claim, that the atmosphere in the office was extremely chaotic and tense. Believing that he was continually harassed and threatened, Carroll lived in continual dread of being blamed for some problem regardless of his involvement in the situation. Single day vacations and breaks during his shift, he says, were not permitted. Carroll also claims that there was insufficient support personnel to meet his job requirements and that at times he received directives ordering him to violate rules, safety procedures and federal law.

Carroll's injuries are purely emotional and psychological. He has been medically diagnosed as suffering from major depression with anxiety, obsessive compulsive traits and situational stress response.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because the Court of Appeals for the Third Circuit properly affirmed the District Court's grant of summary

judgment on the issue of negligent infliction of emotional distress. Moreover, the holding of the District Court is narrow, applying only to the facts in this case. The decision does not have far-reaching consequences and there are no special or important reasons for granting certiorari. Contrary to the assertions of the Petitioner, there is no conflict among the courts as to what constitutes negligent or intentional infliction of emotional distress.

A. The Case Turns On Its Particular Facts and There Are No Special Or Important Reasons for Granting Certiorari

What Petitioner seeks is to have the Court review the factual conclusions of the lower courts and analyze their propriety. As this Court has held, it does not "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The District Court's opinion was narrow and turned on the facts presented. The decision is important only to the litigants in this case. As such, there are no special or important reasons favoring the exercise of the Court's discretionary power of review.

B. It Is The General Consensus Of The Courts That There Can Be No Recovery For Negligent Infliction Of Emotional Distress Without Some Precipitating Physical Injury, Accident, or Near Miss

The Federal Employers' Liability Act ("F.E.L.A.") is a federal negligence statute which applies to the railroad industry. 45 U.S.C. §§51-60. Liability is not absolute, but predicated on a finding of negligence. *Brady v. Southern Ry.*, 320 U.S. 476, 484 (1943); *Inman v. Baltimore & O. R.R.*, 361 U.S. 138, 140 (1959). The Court, in *Atchison, T. & S. F. Ry. v. Buell*, 480 U.S. 557 (1987), provided guidelines to be followed in dealing with claims for emotional distress under the F.E.L.A. The viability of a claim for emotional distress does not

necessarily rest upon a pure question of statutory construction; but rather, as the Court stressed, on developing a full record on the exact nature of the injury and the character of the tortious activity. *Id.* at 568. Once the record has been developed, the appropriate legal principles based on "common-law concepts for negligence and injury," *Urie v. Thompson*, 337 U.S. 163, 182 (1949), are to be applied to the particular facts at hand. *Atchison, T. & S. F. Ry. v. Buell*, 480 U.S. at 570. This is exactly what was done by the District Court in granting summary judgment and by the Court of Appeals in affirming its ruling.

Courts dealing with the issue of negligent infliction of emotional distress under the F.E.L.A. have uniformly held that there must be a precipitating physical injury, accident or near miss giving rise to an actual fear of injury to allow recovery. *See, e.g., Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir. 1991); *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 970 (1991); *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073 (E.D. Pa. 1989), *appeal dismissed*, 899 F.2d 1360 (3d Cir. 1990); *Gaston v. Flowers Transp.*, 675 F. Supp. 1036 (E.D. La. 1987), *aff'd*, 866 F.2d 816 (5th Cir. 1989); *Gillman v. Burlington N. R.R.*, 673 F. Supp. 913 (N.D. Ill. 1987), *aff'd*, 878 F.2d 1020 (7th Cir. 1989); *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987); *Moody v. Maine Central R.R.*, 620 F. Supp. 1472 (D. Me. 1985) *aff'd*, 823 F.2d 693 (1st Cir. 1987); *Adkin v. Seaboard System R.R.*, 821 F.2d 340 (6th Cir. 1987), *cert. denied*, 484 U.S. 963 (1987); *Finn v. Consolidated Rail Corp.*, 622 F. Supp. 41 (D. Mass. 1985), *aff'd*, 782 F.2d 13 (1st Cir. 1986); *Beanland v. Chicago, R. I. & Pac. R.R.*, 345 F. Supp. 220 (W.D. Mo. 1972), *rev'd*, 480 F.2d 109 (8th Cir. 1973); *Seis v. Chicago & N. Transp. Co.*, 736 F. Supp. 962 (E.D. Wis. 1990); *Amendola v. Kansas City S. Ry.*, 699 F.Supp. 1401 (W.D. Mo. 1988); *Angst v. Great Northern Ry.*, 131 F. Supp. 156 (D. Minn. 1955).

Petitioner, in the writ and accompanying record presented to the Court, clearly demonstrates that this case does not deal with an employee who was either involved in or witness to any accident or injury. Likewise, Carroll has not described any specific event that caused him to fear for his own safety or the safety of others. The January 9, 1989 incident Carroll relates involved only inoperative or ringing phones, blaring radios, misdirected cars and disagreements over a crew consist. (Respondent's Appendix at B1-B2.) Because the record in this case is devoid of any accident, injury or near miss to Carroll or anyone else, Petitioner cannot sustain a claim for negligent infliction of emotional distress.

C. Courts Have Uniformly Held That Recovery For Intentional Infliction Of Emotional Distress Is Based Upon Establishing Outrageous Conduct

Although Petitioner complained of a tense atmosphere in his office, similar to a totalitarian state, he did not plead the tort of intentional infliction of emotional distress.¹ In order to recover for intentional infliction of emotional distress, Carroll must prove that he was subjected to outrageous conduct and unconscionable abuse. Restatement (Second) of Torts §46; *Atchison, T. & S. F. Ry. v. Buell*, 480 U.S. at 567 n. 13; *Kraus v. Consolidated Rail Corp.*, *supra.*; *Adams v. CSX Transp.*, 899 F.2d 536 (6th Cir. 1990); *Elliott v. Norfolk & W. Ry.*, 722 F. Supp. 1376 (S.D.W.V. 1989), *aff'd*, 910 F.2d 1224 (4th Cir. 1990); *Netto v. Amtrak*, 863 F.2d 1210 (5th Cir. 1989); *Quitmeyer v. South Eastern Pennsylvania Transp. Auth.*, 740 F. Supp. 363, 368 (E.D. Pa. 1990); *Simmons v. Norfolk & W. Ry.*, 734 F. Supp. 230

1. The Court in *Atchison, T. & S. F. Ry. v. Buell*, 480 U.S. at 568 n. 16, states "[t]he tort of intentional infliction of mental distress as described in §46 of the Restatement [(Second) of Tort] can be safely characterized as the general rule in the United States. . . ."

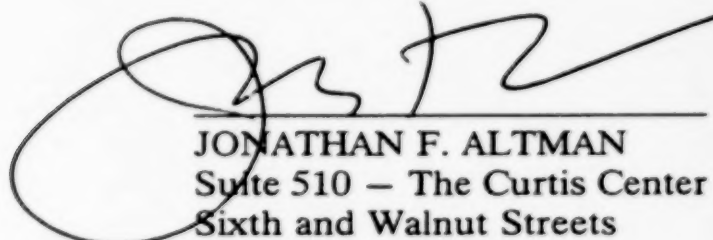
(W.D. Va. 1990); *Harris v. Norfolk & W. Ry.*, 720 F. Supp. 567 (W.D. Va. 1989).

Carroll never described any specific incident where he was harassed or unfairly criticized. The much feared phone or mail notification of complaints against him never arrived. The only incident Carroll does relate is the one that occurred on January 9, 1989 where there seemed to be pandemonium in the office with people around him yelling and arguing. If being cursed, yelled or screamed at is not actionable under the F.E.L.A., *Simmons v. Norfolk & W. Ry.*, 734 F. Supp. at 232; *Adams v. CSX Transp.*, *supra*, then witnessing such conduct cannot be actionable either. "Liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Restatement (Second) of Torts §46 comment d. It was appropriate for the Circuit Court of Appeals to affirm the District Court's grant of summary judgment because as comment h to Restatement (Second) of Torts §46 instructs "it is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery . . ." *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1988); *Fudge v. Penthouse Int'l Ltd.*, 840 F.2d 1012, 1021 (1st Cir.) *cert. denied*, 488 U.S. 821 (1988); *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1274 (3d Cir. 1979); *Simmons v. Norfolk & W. Ry.*, 734 F. Supp. at 232; *LeCroy v. Dean Witter Reynolds, Inc.*, 585 F. Supp. 753, 765 (E.D. Ark. 1984); *Kutner v. Eastern Airlines, Inc.*, 514 F. Supp. 553, 557 (E.D. Pa. 1981).

CONCLUSION

For all the foregoing reasons, Respondent, Consolidated Rail Corporation, respectfully requests that the Petition for Writ of Certiorari of Thomas J. Carroll should be denied.

Respectfully submitted,



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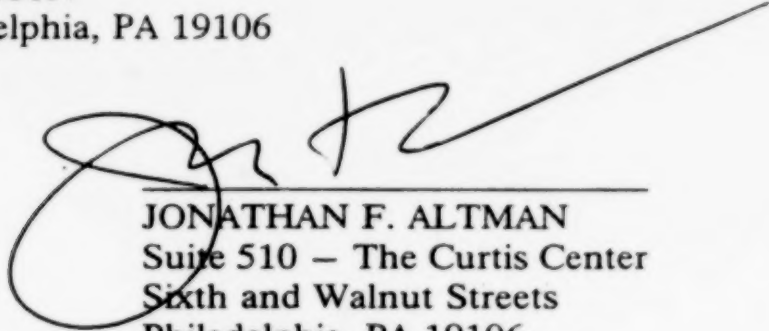
*Attorney for Respondent,
Consolidated Rail Corporation*

November 27, 1991

CERTIFICATION OF SERVICE

I hereby certify that three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari were served on counsel for Petitioner at the address below by United States Mail, first-class postage prepaid, on November 27, 1991 pursuant to Supreme Court Rule of Procedure 29.3:

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APPENDIX TO
BRIEF OF RESPONDENT IN OPPOSITION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 89-4650

THOMAS J. CARROLL

v.

CONSOLIDATED RAIL CORPORATION

Oral deposition of THOMAS J. CARROLL, taken pursuant to notice, in the law offices of Consolidated Rail Corporation, 1138 Six Penn Center Plaza, Philadelphia, Pennsylvania, commencing on Wednesday, April 25, 1990, at or about 2:30 p.m., before Linda M. Passero, C.S.R., N.P.

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* * * *

BY MR. ALTMAN:

Q. What occurred then on January 9, 1989 that you say caused you an injury?

BY MR. CARROLL:

A. I was on the left side of the room. I said to John MacPherson, we're on the left side of the room, and MacPherson said, yes, the phones aren't working on the right side of the room. I said, it just dawned on me we were on the left side of the room. Behind me — Scanlan was behind me. He was behind me to my right and he was back there, and there was some kind of a big foul up

about some car they were supposed to get. They were supposed to get it out of some train and they didn't get it out of the train and the train was out of the yard, and the train was on the road and was running. And Scanlan was in back of me here, he was in back of me screaming on the phone, and he was trying to figure out where he was going to stop this train to get this car out of it. And in the meantime up front there were two train dispatchers up front and there was somebody screaming up there about reports and Mr. Clark and Mr. Rulis were in a dispute up in the front and that's what was going on then.

Q. What is it that you say caused you injury?

A. Well, when I came in — when I first came in it was like pandemonium. It was like in half a vacuum. It was like half there. Like sort of a dim light bulb or half there, like a half vacuum, and I remember I couldn't stand it. He was there, back there screaming and they were up front screaming. And I got up and walked down the hall, I walked down the hall towards the bathroom and I didn't want to go back in. And then I thought I got to go back in. And I walked in and the phones were ringing and the radios were blaring and I walked back in and sat down. I was there for a little while and then I walked out the back door and I walked towards the copying machine and then I came back in and I walked in again and I sat down again and it just kept going and going. And by this time the train was on the road, they were trying to figure — Scanlan was trying to arrange something to get this car out and it just — it just seemed like it kept going. It kept going and going. And then finally I got a hold of the daylight — called the daylight ACD at home and I asked him if he would come in and take over the job and I told Mr. Scanlan I was sick and left.

* * * *